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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

KENT JAMES,

Defendant and Appellant.

D047941

(Super. Ct. No. SCD192555)

APPEAL from a judgment of the Superior Court of San Diego County, Kerry Wells, Judge. Affirmed.

BACKGROUND

The Starling Drive 7-Eleven (Phahez): February 2, 15 and 24, 2005

In February 2005 Najib Phahez owned a 7-Eleven convenience store on Starling Drive in San Diego. In early February an employee of the 7-Eleven noticed items were missing from the health and beauty section of the store. Phahez determined there was a loss valued at \$694. He examined the store's security tapes and saw someone on

February 2, 2005, remove products from the shelf. He called the police and provided them with a compact disc of the footage.¹

On February 15, 2005, Phahez noticed additional items were missing from his 7-Eleven. Again, he looked at the footage on his security cameras and saw someone removing products.² A second tape linked to the cash register showed only a \$0.30 sale of gum. The loss was estimated at less than \$200.

On February 24, 2005, Phahez noticed another loss of merchandise. The security tape showed approximately \$170 worth of merchandise being taken. This time Phahez's son wrote down the license plate number of individuals in the store and gave it to the police.

The San Carlos Drive 7-Eleven (Ramirez): February 15, 2005

In February 2005 Frank Ramirez was the assistant manager of a 7-Eleven convenience store on San Carlos Drive in San Diego. The store was equipped with four security cameras.

On February 15, 2005, one of the security tapes recorded an African-American man and woman enter the store and go in separate directions. The tape, entered at trial as Exhibit 4, showed appellant go to the cash register. Another tape, entered at trial as

¹ Exhibits 1 and 2, which were introduced at trial, contain two different footage clips from separate cameras. The store was equipped with a total of eight security cameras.

² The clip of this footage was admitted at trial as Exhibit 3.

Exhibit 5, showed Tanya Evans go to the ATM machine where she pretended to withdraw money. She was actually putting store merchandise into her pockets.³

After the February 15 theft, appellant, Tanya Evans and another man came into the store on at least four or five different occasions, in different combinations and in three different vehicles. On one of these occasions a store employee asked appellant if he had seen him in the store before. In response, appellant made the comment: "Yeah, you probably have my picture in the back." Ramirez interpreted this statement as an acknowledgment that appellant knew he was being carefully watched by the 7-Eleven staff. On another occasion appellant returned to the 7-Eleven.⁴ Ramirez immediately recognized him as the man who had been in the store on February 15. Ramirez saw appellant take a camera off the shelf and then stand in line at the cash register. Appellant told Ramirez he was returning the camera and wanted a cash refund for it. Ramirez gave him the cash rather than cause a conflict. Appellant then bought a lottery ticket with the money.

Tanya Evans knew appellant for approximately 12 years and lived with him for 2 years. She testified that on February 15, 2005, she and appellant went to the 7-Eleven on Starling Drive. Later that day they went to the 7-Eleven on San Carlos Drive. She admitted she "might" have taken items from the Starling Drive store on February 2, 2005.

³ At the time of trial, Exhibit 5 was not viewable due to static. It was clear, however, on February 17, 2005, when it was viewed by San Diego Police Officer Todd Turner.

⁴ Ramirez estimated at trial that the camera incident could have been as early as two days after the February 15, 2005, theft.

Evans identified herself and appellant on trial Exhibits 1 and 2 relating to the Starling 7-Eleven thefts. She identified herself and appellant on trial Exhibit 4 from the San Carlos theft.

Tanya Evans further testified that on February 15, 2005, she helped "aid and abet" appellant steal from the Starling Drive 7-Eleven. She stated that if she was with appellant she helped him steal because "[w]e helped each other." When asked to explain this response, Evans stated they were doing it together. Appellant would go in and "steal his" and she would go in and steal for herself. If appellant chose to go in while she was there buying something, then he would go in and would steal something for himself, "or vice versa."

Appellant was charged with four counts of commercial burglary in violation of Penal Code section 459. The burglaries were alleged to have occurred on February 2, 2005 (count 1), February 15, 2005 (counts 3 and 6) and February 24, 2005 (count 9). He was also charged with grand theft of personal property in violation of Penal Code section 487, subdivision (a) (count 2). The grand theft was alleged to have occurred on February 2, 2005. It was also charged that he committed three counts of petty theft of retail merchandise, two occurring on February 15, 2005, and one occurring on February 24, 2005 (counts 4, 7 and 10). The petty thefts were charged as having occurred with a prior-related offense in violation of sections 484, 490.5 and 666. Co-defendant Tanya Evans was charged with these same offenses. She later pled guilty to one count of petty theft. The remainder of the charges against her were dismissed. On December 7, 2005, a jury convicted appellant of the eight charged counts. The trial court found the prior

allegations to be true. Appellant was sentenced to a term of six years in prison. On appeal he argues the trial court committed instructional error. We affirm.

DISCUSSION

Appellant's sole argument on appeal is that the trial court erred when it refused to give CALJIC No. 2.92, specifically, with respect to the identification offered by Ramirez in the San Carlos Drive 7-Eleven burglary. CALJIC No. 2.92 sets forth factors the jury may consider in proving identity by eyewitness testimony.⁵ In refusing to give the

⁵ "Eyewitness testimony has been received in this trial for the purpose of identifying the defendant as the perpetrator of the crime[s] charged. In determining the weight to be given eyewitness identification testimony, you should consider the believability of the eyewitness as well as other factors which bear upon the accuracy of the witness' identification of the defendant, including, but not limited to, any of the following:

"[The opportunity of the witness to observe the alleged criminal act and the perpetrator of the act;]

"[The stress, if any, to which the witness was subjected at the time of the observation;]

"[The witness' ability, following the observation, to provide a description of the perpetrator of the act;]

"[The extent to which the defendant either fits or does not fit the description of the perpetrator previously given by the witness;]

"[The cross-racial [or ethnic] nature of the identification;]

"[The witness' capacity to make an identification;]

"[Evidence relating to the witness' ability to identify other alleged perpetrators of the criminal act;]

"[Whether the witness was able to identify the alleged perpetrator in a photographic or physical lineup;]

"[The period of time between the alleged criminal act and the witness' identification;]

"[Whether the witness had prior contacts with the alleged perpetrator;]

"[The extent to which the witness is either certain or uncertain of the identification;]

"[Whether the witness' identification is in fact the product of [his] [her] own recollection;]

"[_____];] and

instruction, the trial court stated it was not appropriate because substantial evidence, including surveillance video and the testimony of Tanya Evans, corroborated Ramirez's identification.

The parties agree that *People v. Wright* (1988) 45 Cal.3d 1126, 1144, requires CALJIC No. 2.92 or a similar instruction be given where identification is a crucial issue and there is no substantial corroborative evidence giving the identification independent reliability. (*Ibid.*) They disagree as to whether such corroborative evidence of Ramirez's identification exists. We conclude it does.

Exhibit 4 offered a clear depiction of appellant and Tanya Evans entering the 7-Eleven together, then splitting up. Both Ramirez and Evans viewed the tape in court and pointed out appellant. On appeal appellant discounts the use of the surveillance video on the ground that it is "grainy" and unclear. ! (AOB 14)! Appellant is confused. Two videos were retrieved from the 7-Eleven on San Carlos Drive. The first video, marked Exhibit 4 at trial, showed appellant and Tanya Evans entering the store together and splitting up; appellant going to the cashier and Evans going toward the ATM machine. The second videotape, marked Exhibit 5, was of Evans at the ATM machine pretending to be getting money from it but in fact putting store merchandise into her clothing. It was Exhibit 5, not Exhibit 4, which was grainy and not viewable at the time of trial.⁶

⁶ "Any other evidence relating to the witness' ability to make an identification."
We have viewed Exhibit 4. It is clear.

In addition to appellant's presence on Exhibit 4, Tanya Evans, who had known appellant for 12 years, testified that on February 15, 2005, she and appellant entered the 7-Eleven stores on Starling Drive and San Carlos Drive. She testified further that she helped appellant steal from the Starling Drive 7-Eleven. She explained to the jury that she and appellant "helped each other" steal items. If she was buying an item from the store, he would go in and "steal something for himself or vice versa." She identified herself and appellant on Exhibit 4, the surveillance tape from the San Carlos Drive 7-Eleven.

We conclude there was substantial corroborative evidence of Ramirez's in-trial identification of appellant as the individual who came into the San Carlos Drive 7-Eleven on multiple occasions and took merchandise without paying for it.

In any event we conclude that even if error existed in failing to give CALJIC No. 2.92, it is not reasonably probable a result more favorable would have been reached in the absence of the error. (*People v. Wright, supra*, 45 Cal.3d at p. 1144 [applying *People v. Watson* (1956) 46 Cal.2d 818, 836].)

Ramirez identified appellant as the same person who came into the San Carlos store on February 17, 2005. On that day, appellant came in, removed a camera from the shelf and took it to Ramirez, who was at the cash register, telling him he was returning the item and wanted the money back. Rather than cause a scene in the presence of someone inquiring about buying the store, Ramirez gave appellant the money. On another occasion appellant entered the store and on being asked words to the effect

"Haven't I seen you around" by a store employee, stated that the store probably had his picture in the back, implying he knew they were watching him.

On the occasions appellant came into the store, including February 15, 2005, Ramirez was very close to appellant's face, close enough to notice dark marks on the right side of his face. Although Ramirez narrowed his selection to two persons, he could not identify a perpetrator at the live lineup held several days before trial. He explained to the jury that he could not see the faces as well at the lineup as he did in the store when appellant was close to him and the lighting was not as good during the lineup. He further explained there were differences in appellant's appearance between February 15 and the lineup several days before trial. At the time of the lineup, he had facial hair and sideburns, which he did not have at the time of the thefts. Also, whenever appellant came into the store, he was wearing a hat. He wore no hat during the lineup.

Contrary to appellant's argument on appeal, the testimony of Tanya Evans was strong. She related a clear picture of her activities with appellant as they, working together, routinely victimized the 7-Eleven stores in this case. She pointed out their involvement in the thefts at the Starling Drive 7-Eleven, conduct for which appellant was convicted in this case, and likened it to their activities at the San Carlos Drive 7-Eleven. Although the record reflects that at the time of trial she was not a willing witness for the prosecution, she did on redirect admit that the factual basis for her plea was that she aided and abetted appellant in theft.

Also contrary to appellant's argument on appeal, no law enforcement officer excluded appellant as a possible perpetrator of the theft on February 15, 2005, at the San

Carlos 7-Eleven. Appellant repeatedly states Detective Shepherd, who investigated the case, did not believe he was the same person as the man on the tape. Appellant has inverted the evidence. There is no evidence in the record that Detective Shepherd ever believed appellant was not the perpetrator. Rather, the record reflects that during *in limine* proceedings before trial, the prosecutor stated that Detective Shepherd was presented with the license plate number of a red Ford escort; and when he retrieved a photograph of the registered owner, Jiles Richardson, he thought there was a possibility Richardson was the man on the tape. However, when he saw Richardson in person, he could tell there were differences. He concluded Richardson was not the person on the tape. These representations by the prosecutor do not permute into a conclusion that Detective Shepherd believed appellant was not the person on the surveillance tape. At trial, the jury had a chance to see Richardson, who is Tanya Evans's brother. In February 2005 he loaned his car to appellant. Detective Shepherd did not testify. During argument to the jury, there was no suggestion by defense counsel that it was Richardson who was on the surveillance tape.

Finally, appellant argues the case was close and the jury had difficulty reaching a verdict. We disagree. Appellant was charged with eight serious and separate offenses. In light of the multiple contacts that appellant and Tanya Evans had with two separate victims on more than four occasions, there was nothing unusual in the jury taking three days to consider the case or wanting testimony read back. Nor do we detect confusion in the questions asked by the jury. The jury inquired, for example, as to the nature of appellant's workers' compensation settlement. The jurors wanted to know the timing of

documents submitted on the workers' compensation claim. It wanted to know if the plea agreement with Tanya Evans required she specifically implicate appellant. The jury also wanted the testimony of Phahez, Evans and Ramirez read back to it. The jury wanted to know how to fill out a form. Content-wise, none of the questions indicates there was confusion. Nor does the number of questions alone indicate there was confusion. As a whole, they are equally indicative of a conscientious approach to the jury's decision-making.

In sum we conclude CALJIC No. 2.92 was not required to be given by the trial court, and in any event, if it should have been given, there was no prejudice to appellant.

DISPOSITION

The judgment is affirmed.

BENKE, Acting P. J.

WE CONCUR:

McINTYRE, J.

AARON, J.